Supreme Court, U.S.
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In The

Supreme Court of the United States

STANLEY J. GAUDET and AUDREY CHAIX GAUDET,

Petitioners,

vs.

THE SHEET METAL WORKERS NATIONAL PENSION FUND; THE SHEET METAL WORKERS LOCALS AND COUNCILS PENSION FUND; THE NEW ORLEANS SHEET METAL WORKERS LOCAL UNION NO. 11 PENSION FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the appeal panel appropriately used the abuse of discretion standard when interpreting the application of an ERISA statute to the interpretation of an ERISA plan provision by the plan administrator.

2) Whether the panel acted appropriately by retroactively applying the 1997 amendments to ERISA's anti-alienation provisions to forfeiture and civil judgments that preceded the effective date of the amendment.

PARTIES TO THE PROCEEDING

Pursuant to the United States Supreme Court Rule 29.6, Petitioner states that the Petitioners in this *Petition* are Stanley J. Gaudet and Audrey Chaix Gaudet. The Respondents in this *Petition* are The Sheet Metal Workers National Pension Fund, The Sheet Metal Workers Locals and Councils Pension Fund and The New Orleans Sheet Metal Workers Local Union No. 11 Pension Fund. Stanley J. Gaudet and Audrey Chaix Gaudet are natural persons of the age of majority.

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MAY IT PLEASE THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Stanley and Audrey Gaudet, petitioners-plaintiffs herein, respectfully petition the United States Supreme Court to grant a writ of certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit in the matter.

OPINION BELOW

The decision of the United States Fifth Circuit Court of Appeals is contained in Petitioner's Appendix at App. 1-3.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered an opinion divesting the Gaudets of their pension benefits on June 6, 2003. This court now has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory principle is that of 29 U.S.C. § 1056(d)(4). It states:

> (4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if –

(A) the order or requirement to pay arises –

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle, or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 205 apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made –

(i) either –

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan or it is established to the satisfaction of a plan representative that such consent may not be

obtained by reason of circumstances described in section 205(c)(2)(B) or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity is in effect in accordance with the requirements of section 205(c),

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 205(a)(1) and under a qualified pre-retirement survivor annuity provided pursuant to section 205(a)(2), determined in accordance with paragraph (5).

STATEMENT

Stanley and Audrey Gaudet commenced this action against the Sheet Metal Workers New Orleans Local No. 11 Pension Fund, the Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Locals and Councils Pension Fund. The *Original Complaint* sought a determination that the withholding of pension benefits by Defendant plans violated the anti-alienation provisions of ERISA. Appellants moved for summary judgment against the Funds on the grounds that ERISA precluded such an

offset. The district court denied Appellants' *Motion* and indicated its intention to render summary judgment against Appellants, dismissing all claims raised by them, after the submission of supplemental briefs. The district court ultimately rendered summary judgment to both the National Pension Fund and the Locals & Councils Pension Fund.

Appellants timely filed a *Notice of Appeal*. On original hearing, the panel found that the plan administrator had not abused its discretion when it offset Stanley and Audrey Gaudet's pension benefits by the amount of criminal forfeiture and civil judgment awards against them. Appellants submit that the standard of review used, and the statutory interpretation ultimately applied to the merits of this case, are inconsistent with prevailing law and require reconsideration by this Court.

Stanley Gaudet worked as a sheet metal worker from 1946-1989. R. 263. Beginning as a journeyman sheet metal worker, he eventually became involved in the New Orleans Local No. 11 Sheet Metal Workers Union. *Id.* In 1968, plaintiff Stanley J. Gaudet began working for the union as an officer on a full-time basis, and continued to do so until 1989. *Id.* He participated as a member of the executive board of the Union from 1958 until 1962, and as President and Business Manager from 1962 until 1989. *Id.*

During this time period, Gaudet became eligible for participation in the pension plan offered by the New Orleans Local No. 11 Sheet Metal Workers Union. R. 444. He began contributions toward the Pensions at issue in this matter in question in 1962. He accumulated employer credits during his tenure as a sheet metal worker and ultimately accumulated over fifty (50) years of credits

towards the calculation of his pension. Because he served on a full-time basis as a member of the board of trustees of the Local Union, and as President of the Local, he also became eligible for participation in the pension plan created for business agents of the Unions and known as the Sheet Metal Workers Locals and Councils Pension Fund. Gaudet became a participant of both of these pension plans and made contributions to the funds as he was allowed to do so.

During the 1980s, Mr. Gaudet apparently embezzled an undetermined amount of money from the Local No. 11 Pension Fund. R. 444-445. As he never had any connection with nor any involvement with the administration or management of the Locals and Councils Pension Fund, he never participated in any acts of fiduciary duty or fiduciary breach with respect to that Fund. No one has ever definitively calculated the exact amount of money actually taken from the Local by Mr. Gaudet. No evidence has ever been provided, and certainly no proof demonstrated, that Mrs. Gaudet had any knowledge of or complicity in the alleged embezzlement from the pension funds in which Mr. Gaudet engaged. The only link she has to this case is that she was married, and continues to be married to, Stanley Gaudet. Further, no one has ever identified Mr. Gaudet's conduct as the sole and only loss causing activity then ongoing at the Local No. 11 Pension Fund. Yet Stanley Gaudet is the only person connected with those losses that has ever been prosecuted for the losses.

The district judge in the criminal proceedings stated that, as part of Mr. Gaudet's restitution obligation, Mr. Gaudet would be required to "relinquish" his pension to the International Sheet Metal Workers Association. R. 1052. Although the Court of Appeals found it reasonable

for the district judge to be unaware of the ERISA anti-alienation provision, defense counsel, who presumably would have no reason to be aware of *any* provision of ERISA, was faulted for failing to object to the forfeiture of the three pensions. When the issue was raised on direct appeal, such a shortcoming was found not to constitute plain error. *United States v. Gaudet*, 966 F.2d 959, 964 (5th Cir. 1992).[1] When counsel's failure to object was raised in a petition under 28 U.S.C. § 2255, the Court of Appeals held that the issue was not cognizable under § 2255, because "it is a challenge to a cash fine and does not meet the 'in custody' requirement of § 2255." *United States v. Gaudet*, 81 F.3d 585, 592 (5th Cir. 1996).[2]

Mr. and Mrs. Gaudet sought on a number of occasions to obtain Mr. Gaudet's pension benefits. In February of 1991 Mr. Gaudet submitted an application for benefits to the National Pension Fund and the Locals and Councils Pension Fund. The Funds returned materials to Mr. Gaudet indicating that he had qualified for his pension

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[1] In every case but Gaudet's, a district court's misinterpretation of its authority to order restitution has been considered plain error. *See United States v. McArthur,* 108 F.3d 1350, 1357 (11th Cir. 1997); *United States v. Obasohan*, 73 F.3d 309 (11th Cir. 1996).

[2] In the instant matter, the J & C Order required Stanley Gaudet to forfeit his pension to the funds from whom he allegedly embezzled funds, in partial satisfaction of the $2,750,538.87 restitution obligation recognized by the J & C Order. R. 1052. Some $2,149,192.33 of that was to go to the NPF. Yet the NPF had already obtained restitution in excess of $2,449,295.64 from Fidelity & Deposit Company of Maryland, the fidelity bond insurer for the Fund. R. 1060. Thus any attempt to compel Gaudet to forfeit his pension and maintain NPF as the victim deserving of restitution only insured that the NPF obtained more in compensation than the amount calculated in the J & C Order.

and that the date for his eligibility would be March 1, 1991. Again in 1999 Mr. Gaudet made similar application to both the NPF and the LUCPF requesting his benefits. Again eligibility information was returned, his acceptance for benefits was indicated, and he did in fact return all of the materials necessary to obtain his full pension benefits. Despite these two acceptances, and despite these two indications from the Funds that Stanley Gaudet is entitled to substantial pension benefits, no benefits have been paid to him from either Fund.

REASONS FOR GRANTING THE WRIT

The panel decision in this case granted undue deference to the plan administrator's application of those statutes to the provisions of an ERISA pension plan. That undue deference is particularly prejudicial in the instant matter in that the interpretation made by the plan administrator constitutes an improperly retroactive application of a Congressional enactment that was clearly meant to be prospective only. This Court should hear the instant matter *en banc* and reverse that panel decision.

I. THE PANEL DECISION IMPROPERLY APPLIES THE ABUSE OF DISCRETION STANDARD TO THE CIVIL AND CRIMINAL JUDGMENTS AGAINST STANLEY GAUDET.

The panel in this matter held that the applicable standard of review for the claims brought by Stanley and Audrey Gaudet was for an abuse of discretion by the plan administrator. Yet, because Mr. and Mrs. Gaudet were actually challenging the application of a statutory

provision to a plan provision, the panel should have reviewed that interpretation *de novo*. The inconsistency created in the jurisprudence by use of this excessively lenient standard of review requires *en banc* reconsideration by this Court.

The instant matter seeks a determination that the Defendants' offsetting of Mr. and Mrs. Gaudet's pensions violates the anti-alienation rules of ERISA. It is well-established that "unlike a claim for benefits under a plan, which implicates the expertise of a plan fiduciary, adjudication of a claim for a violation of an ERISA statutory provision involves the interpretation and application of a federal statute, which is within the expertise of the judiciary." *Smith v. Sydnor*, 184 F.3d 356, 365 (C.A.4 1999). *De novo* review of the application of the statute to the plan provisions is the appropriate standard of review.

That *de novo* review of ERISA's terms to a plan provision is the appropriate standard of review has been borne out by the previous decisions of this Court in applying that standard of review. In *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), this Court was squarely confronted with the question of whether or not it should apply a *de novo* standard of review to questions of law interpreted by a plan administrator. Specifically, the Court noted that the issue before it was whether or not a plan participant was fully vested despite a break in service occurring during the period of his employment with the plan sponsor. In reviewing whether or not it would afford pension benefits despite this break in service, the Court very clearly indicated that – though it might apply a deferential standard of review to factual determinations made by the administrator – it would not give such deference to the legal conclusions drawn by the administrator:

In *Firestone,* however, the Supreme Court discussed in detail the emergence and history of the arbitrary or capricious standard as applied to ERISA cases. It pointed out that prior to ERISA, disputes involving denial of benefits under a pension plan were governed by contract law principles. Courts have long applied a *de novo* standard of review in interpreting contracts. *Firestone,* 109 S.Ct. at 955. Because "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,'" *id.* at 955 (quoting *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983)), the Court pointed out that it would contravene those purposes to impose a standard of review that afforded less protection to employees than they had prior to ERISA. Accordingly, "*wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." *Id.* at 953 (emphasis in original).

Because the Howe-Baker plan falls under the *Firestone* exception, we continue to apply the arbitrary or capricious standard to the Committee's interpretations of the Plan – the contract – and any fact findings the Committee made. As long as the interpretations or fact findings are not arbitrary or capricious, we do not upset them. The Committee's authority to make such determinations is granted by the terms of the Plan itself. However, in contrast to the great deference we grant the Committee's interpretations of the Plan, which involve contract interpretation, we accord no deference to the Committee's conclusions as to the controlling law, which involve statutory interpretation. The interpretation of

> ERISA itself must be made *de novo* by the court. Such is the impact of *Firestone*.

Id. at 1099-1100. *See also, Rhorer v. Raytheon Engineers and Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999); *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999) ("A court reviews a plan administrator's statutory and legal conclusions de novo"). The panel in the instant matter incorrectly used the less deferential standard of abuse of discretion when interpreting the statutory issues involved in this matter.

In the instant case, the panel did not determine whether or not the application of the plan terms to the Gaudets violated ERISA – it instead used an abuse of discretion standard to determine that the plan interpretation was reasonable under the plan terms. Yet that overly deferential standard of review overlooks the obvious fact that the federal courts have been vested with the authority to determine whether the *plan terms* are in compliance with *the ERISA statute*. Although the Court may give deference to the plan with respect to the former question, it must give no deference to the plan in determining whether it complies with the applicable ERISA law and regulation. *Compare, e.g., Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 234-235 (4th Cir. 1997) ("Whether MetLife's denial notice complied with this regulation is a question of law subject to *de novo* review"); *Recupero v. New England Tel. and Tel. Co.*, 118 F.3d 820, 827 (1st Cir. 1997) ("The review is also to be *de novo* review to assure compliance of the out-of-court decisionmakers with standards of conduct analogous to those applied to trustees under judicially developed law"); *Snodgrass v. Simpson Timber Co.*, 955 F.2d 48, 49 (9th Cir. 1992) ("We review *de novo* the question of whether Simpson's benefit plan

complied with ERISA"). An opposite conclusion could result in substantial chicanery, as any ERISA plan could incorporate into its terms provisions wholly inconsistent with ERISA, and the courts would simply forego review of those terms for compliance with ERISA because the interpretation given to those terms comported with the intent of their wording.

Congress never intended for the courts to forego judicial review of plan terms for compliance with ERISA. For these reasons, the Court should grant *en banc* review of the panel decision and should reverse that decision.

II. THE PANEL ERRED BY ALLOWING A RETROACTIVE APPLICATION OF AMENDMENTS TO ERISA THAT WERE CLEARLY INTENDED TO BE PROSPECTIVE ONLY.

At the heart of the panel's decision is its acquiescence in the assertion that obtained all of his pension benefits through embezzlement from the Fund and thus he is no longer owed his vested pension. Yet Congress has clearly and unambiguously stated that, at the time of the conduct of Mr. Gaudet in allegedly embezzling money from the pension funds, there existed no means by which to reduce a pension owed to a beneficiary by the amounts taken by that beneficiary through a breach of fiduciary duty.

Prior to August 5, 1997, the United States Supreme Court's decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), expressly precluded the offsetting of pension benefits by pension funds for alleged breaches of fiduciary duty. *Guidry* specifically held:

> In our view, the two statutes are more persuasively reconciled by holding that the LMRDA

> determines what sort of judgment the aggrieved party may obtain, while ERISA governs the narrow question whether that judgment may be collected through a particular means – a constructive trust placed on the pension.
>
> Nor do we think it appropriate to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Id. at 376. That holding led this Court in *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir. 1990), to conclude that ERISA's anti-alienation provisions precluded the offsetting of pension benefits in the manner attempted by the NPF in the instant matter. *See, id.* at 804. Consequently, at the time of the judgments rendered against Mr. Gaudet in both the civil and criminal cases against him, the law precluded the offsetting of his pension for alleged embezzlement from the funds.

On August 5, 1997, Congress amended ERISA to allow pension plans to claim discharge from liability for pension payments where a fiduciary had already paid himself his pension through embezzlement from the plan.

> (4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an

amount that the participant is ordered or required to pay to the plan if –

(A) the order or requirement to pay arises –

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle, or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 205 apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made –

(i) either –

(I) such spouse has consented in writing to such offset and such consent is

witnessed by a notary public or representative of the plan or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 205(c)(2)(B) or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity is in effect in accordance with the requirements of section 205(c),

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 205(a)(1) and under a qualified pre-retirement survivor annuity provided pursuant to section 205(a)(2), determined in accordance with paragraph (5).

29 U.S.C. § 1056(d)(4). That amended statutory provision altered pre-existing law as it existed under *Guidry* and *Herberger*. It thus created a new cause of action not extant prior to its enactment and certainly not extant at the time of the activity that is the subject of this litigation.

Yet Congress made it clear that there existed no right to decrease a pension by amounts taken from the plan prior to the effective date of the amendment. In the bill that ultimately became the current § 1056, Congress

indicated its unequivocal mandate that the courts apply the amendment solely to transactions occurring *after* its enactment. "The amendments made by this section shall apply to judgments, orders, and decrees issued, and settlement agreements entered into, on or after the date of the enactment of this Act." 111 Stat. 1061, 1503. The Conference Report accompanying the enactment further states that "amendment is effective for judgments, orders, and decrees issued, and settlement agreements entered into, on or after the date of enactment." 143 Cong. Rec. H at 6604. Congress intended for the amendment to apply prospectively to judgments and agreements reached *after the time of its enactment*. That Congressional intent is conclusive as to the application of the statute – once Congress has manifested an unambiguous intent that a statute be applied prospectively, that intent forecloses the possibility that the statute may ever be read to have retroactive application. *See generally, Plaut v. Spendthrift Farm*, 514 U.S. 211, 237 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994). Thus any judgment which by explicit instruction or direct effect extinguishes a pension based on prior criminal conduct or civil judgments involving the plan and the participant is patently illegal.

The judgment rendered in the civil action brought against Stanley Gaudet by the NPF's predecessor in interest occurred on May 25, 1994. R. 598. The restitution order made part of the sentence in the criminal proceeding against Mr. Gaudet was entered on July 24, 1991. R. 1051. Both of these judgments took place prior to the amendment allowing the use of such judgment to offset pension benefits payable to those alleged to have committed breaches of fiduciary duty and their spouses. Because Congress recognized the lack of any provision of law

permitting such offset at the time it amended the statute in 1997, and the amendment permitting such offset applies only prospectively, there exists no legal basis for this Court to allow an offset of Plaintiffs' pension benefits by virtue of those two prior judgments. The panel decision has the same effect as a retroactive application of the statute sufficient to taint that judgment with reversible error. *En banc* review by this Court is essential to correct this clear error of law.

CONCLUSION

For the foregoing reasons, Stanley and Audrey Gaudet respectfully move this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30307

STANLEY J. GAUDET; AUDREY CHAIX GAUDET,

Plaintiffs-Appellants,

versus

THE SHEET METAL WORKERS NATIONAL PENSION FUND; THE SHEET METAL WORKERS LOCAL UNIONS & COUNCILS PENSION FUND; THE NEW ORLEANS SHEET METAL WORKERS LOCAL UNION NO. 11 PENSION FUND,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 01-CV-718-K

(Filed June 6, 2003)

Before JOLLY, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Stanley Gaudet and Audrey Gaudet (the Gaudets) brought this action under ERISA to obtain pension benefits they contend were wrongfully denied by the Sheet Metal Workers Local Unions and Councils Fund (LUCF) and the Sheet Metal Workers National Pension Fund (NPF). The district court granted summary judgment in favor of LUCF based on the Gaudets' failure to exhaust their administrative remedies. The district court granted summary judgment in favor of NPF on the grounds that the plan administrator did not abuse its discretion when it determined that NPF owed no benefits to the Gaudets under the terms of the plan. The Gaudets appeal.

We review a district court's determination that exhaustion of administrative remedies is required for abuse of discretion. *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corp.*, 215 F.3d 475, 479 (5th Cir. 2000). Plaintiffs seeking benefits from an ERISA plan must exhaust available administrative remedies before bringing suit to recover benefits. *Id.* However, we have recognized an exception to the exhaustion requirement where pursuit of administrative remedies would be futile or the reviewing committee is hostile or biased against the claimant. The Gaudets offered no evidence to the district court that pursuit of administrative remedies would have been futile or that the LUCF reviewing committee would be hostile to their claims or biased against them. Therefore, the district court did not err in granting summary judgment in favor of LUCF.

We review a denial of benefits by a plan administrator for abuse of discretion when the plan gives the administrator the discretionary authority to interpret the plan. *Spacek v. The Maritime Assoc., I.L.A. Pension Plan*, 134 F.3d 283, 288 (5th Cir. 1988). The Gaudets contend that

NPF denied them pension benefits as an illegal offset to money owed by Stanley Gaudet to the NPF by virtue of criminal and civil judgments against him arising from his earlier embezzlement of pension funds. NPF argues, and the record reflects, that the plan administrator relied on the terms of the plan that no person covered by the plan is entitled to obtain more than one pension from the fund in denying the Gaudets' claim. Because the money Stanley Gaudet embezzled from the plan for his personal use exceeded the amount he was entitled to receive as a pension, the plan administrator determined that the provisions of the plan barring duplicate pensions applied to prevent the distribution of a second pension to Stanley Gaudet. Although the provision in the plan may be ambiguous, the Gaudets have not shown that the administrator abused its discretion in interpreting the plan to deny benefits, particularly given the existence of a prior court order requiring Stanley Gaudet to forfeit his pension benefits and the equities that are plain in the factual and legal circumstances of this case.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STANLEY J. GAUDET and AUDREY CHAIX GAUDET	**CIVIL ACTION**
VERSUS	**NO. 01-0718**
SHEET METAL WORKERS' NATIONAL PENSION FUND, THE SHEET METAL WORKERS' LOCAL UNIONS and COUNCILS PENSION FUND, and THE NEW ORLEANS SHEET METAL WORKERS' LOCAL UNION No. 11 PENSION FUND	**SECTION "K"(5)**

ORDER AND REASONS

(Filed Nov. 28, 2001)

Before this Court is Plaintiffs' Motion for Partial Summary Judgment (rec. doc. 18) and Plaintiffs' Motion for Summary Judgment as to Counterclaims Against Audrey Gaudet (rec. doc 17). After a review of the pleadings, oral presentations and the relevant law, this Court finds no merit in the first motion and as a result believes that the best course of action is to place plaintiff on notice that it intends to enter summary judgment in favor of defendants, unless plaintiff can come forward with some argument not previously made. This course of action is recognized by the United States Court of Appeals for the Fifth Circuit as noted in *Nowlin v. Resolution Trust Co.*, 33 F.3d 498, 504 n.9 (5th Cir. 1994) stating, "[d]istrict courts may grant summary judgment sua sponte, 'so long as the losing party was on notice that she had to come forward with allow [sic] her evidence.'" Therefore, plaintiff has 10 days, exclusive of holidays from the entry of this order and

reasons to present any other arguments or evidence that it has in its possession to oppose such a motion. With that in mind, the Court defers as to the second motion relating to the counterclaims as it may be rendered moot.

Background

The facts surrounding the motions before this Court stem from Audrey Gaudet's alleged entitlement to certain benefits from several pension funds under which her husband (Stanley Gaudet) was covered during the term of his employment. Those funds include: (1) the Sheet Metal Workers' National Pension Fund (NPF), (2) the Sheet Metal Workers' Local Unions and Councils Pension Fund (LUCPF), and (3) the New Orleans Sheet Metal Workers' Local Union No. 11 Pension Fund (Local 11). However, the Local 11 has since merged into the NPF. (Plans 1 and 3 will be collectively referred to in the Court's analysis as NPF)

Stanley was employed in the sheet metal trades in 1946 and became a member of the executive board of the Local 11 Union and served as its president. Between 1983 and 1989, Stanley embezzled funds from the Local 11 Union and its employee benefit plans. On March 21, 1991 Stanley pled guilty to 22 counts of embezzlement and theft and was sentenced to 18 years and 5 months in prison. The district court ordered Stanley to pay restitution in the amount of $2,750,538.87 to the Sheet Metal Workers' International Association. To satisfy this amount, the district court ordered Stanley to relinquish the pension funds to which he was entitled. Stanley argued on appeal that the anti-alienation provisions of ERISA prevented the district court from ordering him to relinquish his pension

to fulfill the restitution amount, but because he did not object to the court's order at his sentencing, on appeal the Fifth Circuit upheld the district court's ruling under the "plain error" standard. *United States v. Gaudet,* 966 F.2d. 959 (1992).

Audrey explained during Stanley's trial and continues to argue that she had no knowledge of Stanley's illegal actions. Rather, Stanley used the embezzled funds to pay his separate gambling debts and other separate expenses that did not inure to her benefit. Defendants, however, maintain that Audrey had knowledge of and benefitted from the substantial amount of money Stanley embezzled during their marriage. Audrey also contends that any amount of his pension fund Stanley was required to forfeit as restitution did not affect her half of the funds.

Stanley and Audrey have maintained their matrimonial domicile in Louisiana since they were married in March 1968. From March 1968 to May 2001 they lived in a community property regime. On May 14, 2001, plaintiffs entered into a Separation of Property Agreement approved by the state district court. The court's order purportedly fulfilled all requirements necessary to create a valid Qualified Domestic Relations Order (QDRO) and established Audrey as an "alternate payee" of half of Stanley's pension benefits. Specifically, the order establishing the QDRO held:

> . . . that Audrey Gaudet is hereby recognized and is declared to be entitled to one-half of the pension benefits **guaranteed to Stanley J. Gaudet** by those certain pension plans established in his favor by the Sheet Metal Workers' Local Union No. 11 Pension fund . . .

> . . . that Audrey Gaudet is hereby declared to be entitled to one-half of all pension benefit payments **due and payable to Stanley Gaudet** by The Sheet Metal Workers National Pension Fund, and The New Orleans Sheet Metal Workers' Local Union No. 11 Pension Fund from March 1, 1991 to the date of the signing of this judgment. Subsequent to the entry of this judgment, Audrey shall be entitled to receive one-half of all pension benefits **due and owing to Stanley J. Gaudet** until the time of his death . . .

Through the QDRO, Audrey claims to be the beneficiary of a half of the benefits that accrued to Stanley under the plans administered by defendants. The order and Audrey presuppose that funds were "due and owing" to Stanley.

Even though he embezzled from its pension plans, Stanley applied for retirement benefits from the Local 11. However, the Local 11 denied his request and explained that it would be a breach of fiduciary duty to pay a pension benefit to an individual who had already taken an amount of money that exceeded what he would be owed in pension benefits. Plaintiff appealed the denial of benefits and requested reconsideration, but his request was denied on August 30, 1991. The record also states that in 1992, the NPF sent Stanley the requisite forms required to receive benefits and requested that they be returned in thirty days, but he never responded.

Stanley also applied to the LUCPF for retirement benefits during his prison term. The LUCPF directed him to complete and return certain forms within thirty days to be eligible for benefits, but he did not return them. Also,

after the entry of the state court judgment creating the QDRO, the LUCPF determined that the QDRO was not valid because it required payment of funds it was not legally required to disperse because Stanley had not complied with all administrative steps. Plaintiffs are entitled to an administrative appeal from that decision but have chosen to bypass that remedy.

The NPF also brought a civil action against plaintiff in the Eastern District (captioned *William Mazur, et al. v. Stanley Gaudet,* Civil Action No. 89-2723) to recover losses resulting from Stanley's wrongful conversion of plan assets. On May 26, 1994 the court entered judgment in favor of the NPF against Stanley for $18,028,924 plus prejudgment interest running from September 30, 1993 through the date of the entry of judgment.

Procedural History

Plaintiffs filed the instant suit to require defendants to pay benefits allegedly owed to them under their plans. Plaintiffs' petition also prays for: (1) damages for past due benefits, future benefits, interest, attorney fees and any other equitable relief, (2) bad faith breach of contract, (3) damages for mental anguish, lost income, and other damages for wrongful deprivation of benefits due them, (4) unjust enrichment and, (5) unlawful seizure of pension benefits.

In response, NPF lodged a counterclaim against plaintiffs requesting dismissal [sic] plaintiffs' complaint. Generally, the NPF argued that Stanley already obtained *overpayment* of any pension benefits that he claims are owed to him through benefits he and Audrey experienced

from his embezzlement of plan assets. Specifically, defendants sought: (1) declaratory relief that they were entitled to recover the overpayments of benefits received by Stanley Gaudet as a result of his embezzlement of pension plan assets from NPF by offsetting pension benefits that otherwise would be payable to Stanley, (2) declaratory relief that the NPF should be allowed to recover any overpayments made to Audrey through a setoff of such amounts of any survivor annuity she would otherwise be entitled to receive because she knew or should have known her husband was embezzling assets and that that knowledge constituted a premature actual or constructive receipt of benefits she would be entitled to, (3) an order requiring Stanley to fully satisfy the judgment against him in favor of NPF, (4) an order requiring Stanley to pay the NPF, on the 15th of each month, an amount equal to any benefits received prior to the date of the *Mazur* judgment because defendants believe the *Mazur* judgment will not satisfy the entire debt owed to NPF, defendant's fourth cause of action sought, and (5) a declaration that plaintiffs' Separation of Property Agreement is illegal and ineffective because it was procured for the improper purpose of thwarting NPF from obtaining satisfaction of the civil judgment against Stanley.

Partial Motion for Summary Judgment

Plaintiff's Partial Motion for Summary Judgment seeks declaration that Audrey is entitled to benefits from defendants as an alternate payee under the QDRO issued by the Twenty Ninth Judicial District for St. Charles Parish. Plaintiff alleges that: (1) the QDRO is valid on its face and fulfills all requirements necessary to allow Audrey to collect her half of the pension proceeds due to

her husband, (2) under the community property regime benefits that accrue to one spouse during the marriage are equally the property of both spouses, (3) all requirements for a valid QDRO have been satisfied including the name and mailing address of the participant, the amount or percentage of the participants benefits to be paid under the plan, and the number of payments due and, (4) an extrinsic attack on the QDRO should not be permitted because such challenges are not warranted unless the state court was without jurisdiction to enter the QDRO. Finally, plaintiffs claim that it would have been futile to comply with all of the administrative hurdles because it was clear that neither fund was going to pay her the pension she requested.

However, defendant (NPF) claims that plaintiff's partial motion for summary judgment is moot because plaintiffs are not owed any pension benefits. It is the NPF's position that Stanley has already received more than any amount owed under the plan from the funds he embezzled. Furthermore, Audrey's rights under the QDRO are purely derivative of Stanley's rights to receive pension funds from the plan. Therefore, because Stanley is not owed any benefits, Audrey has no entitlement to the NPF funds.

Defendant (LUCPF) asserts that there are material issues of fact sufficient to justify denial of the Partial Motion for Summary Judgment because Audrey Gaudet failed to exhaust the administrative remedies required to receive benefits. First, Stanley failed to complete the requisite forms within the appropriate time frame to receive his pension from the LUCPF. Furthermore, the LUCPF argues that their decision that the QDRO is not valid is subject to administrative appeal, but plaintiff has

chosen to bypass those remedies. Defendants also rely on the reasoning set forth in *Bourgeois v. The Pension Plan for the Employees of Santa Fe International Corporations,* 215 F.3d 475 (5th Cir. 2000), in which the Fifth Circuit held that "claimants seeking benefits from an ERISA plan must exhaust available administrative remedies under the plan before bringing suit to recover benefits."

Motion for Summary Judgment as to the Counterclaims Against Audrey Guadet [sic]

Plaintiff's Motion for Summary Judgment, argues that the second and fifth counterclaim [sic] are governed by the civil enforcement provisions of ERISA and are extinguished by the statue of repose. *See* 29 U.S.C. § 1132 and *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238 (2000) Therefore, defendant should not be permitted to use the counterclaims to offset NPF's obligation to pay Audrey under the terms of the QDRO. Thus, Plaintiff concludes that she is entitled to judgment as a matter of law because that [sic] there are no issues of material fact to be resolved on these counterclaims.

To support its argument, plaintiffs explain that: (1) Audrey is a non-fiduciary of the NPF who allegedly acted as a prohibited transferee of plan asserts [sic] taken in breach of Stanley's fiduciary duty to the plans (29 U.S.C. 1132), (2) under 29 U.S.C. § 1113, actions brought against a non-fiduciary prohibited transferee can not be initiated more than six years after the alleged breach or, in cases of fraud or concealment, after six years of knowledge of the breach, (3) because Stanley's embezzlement of pension funds occurred in the 1980's and he was subject to a civil

judgment in 1994 and because defendants' claims against Audrey stem from the embezzlement, any claims against Audrey for participation in Stanley's breach of the fiduciary duty are extinguished, (4) under ERISA, once six years has passed from the time of the breach, *no* action can serve as the basis for requesting damages or as a means of offsetting obligations owed to the allegedly breaching party and, (5) 29 U.S.C. § 1113 is not subject to equitable tolling (*Radford v. General Dynamics Co.,* 151 F.3d 396 (5th Cir. 1998).

The NPF, however, contends that there are material issues of fact sufficient to defeat the plaintiff's Motion for Summary Judgment and argues that: (1) 29 U.S.C. § 1113 limits the period during which an action may be commenced with respect to a fiduciary's breach of any responsibility, duty or obligation under Part 4 of ERISA, (2) while civil actions commenced under Title I of ERISA are enumerated in 29 U.S.C. § 1132(a), not all of those listed relate to Part 4, (3) the Court must examine the *nature of the civil action* under 29 U.S.C. 1132(a) in order to determine whether it is an action with respect to a fiduciary breach or violation of Part 4, (4) the second counterclaim should be regarded as an act in recoupment that did not arise until plaintiffs filed the instant action to recover benefits and, [sic] and (5) ERISA's Treasury Regulations recognize the validity of recoupment and posit that a counterclaim in the nature of recoupment is never time barred by the statute of limitations as long as the main action itself is timely.

Thus, defendants conclude that whether their claims against Audrey arise separate and apart from Stanley's embezzlement, presents a factual issue to be resolved at trial and is not suitable for summary judgment.

Analysis

Plaintiff's Motion for Summary Judgment

The NPF Pension Plan

As to the NPF plan, the Court is faced with a factual scenario distinguishable from others previously presented in this Circuit. Stanley Gaudet, as trustee for his union and its pension plans, embezzled an amount of money *more* than he would have legally received from the NPF pension plan. Plaintiffs claim that Audrey's rights under Stanley's pension plans were never forfeited by Stanley's criminal acts or the judgments rendered against him and are ripe for payment. Specifically, Audrey Gaudet claims that through the QDRO created by the district court, she is entitled to a half of any benefits owing to Stanley Gaudet. This Court agrees that the QDRO entitles Audrey to a half of any benefits owed to Stanley. However, this Court emphasizes that the language of the QDRO makes Audrey's alleged entitlement to benefits purely derivative of any amount of pension owed to Stanley. Under a logical interpretation of that order, if Stanley is not entitled to any benefits under the pension plan (because he has already received more than his pension), Audrey can not claim any independent right to more benefits under the plan.

Jurisprudential History

In *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990), the United States Supreme Court was faced with a factual scenario in which a union official embezzled funds from the union. When he applied for benefits from one of the union-sponsored plans, his request was denied. The district court held that any plan benefits

otherwise payable to plaintiff should be held in a constructive trust until he payed off all amounts he owed to the union. This decision was based in part on the court's reference to the equitable provisions of 29 U.S.C. § 409(a) which imposes liability on a breaching fiduciary to "make good" any losses suffered by a plan because of the breach. Furthermore, the district court interpreted 409(a) as an exception to 29 U.S.C. § 209(d)(1) which prohibits assignment or alienation of benefits under a plan ("anti-alienation provisions").

On appeal, the United States Supreme Court reversed and held in part that § 409(a) may provide relief for a breach of a fiduciary duty to a plan but noted that the plaintiff in *Guidry* had breached his fiduciary duty to the union (not the *plans*). The Court specifically left open the question presented in this case noting, "[w]e need not decide whether the remedial provisions contained in § 409(a) supercede the bar on alienation in § 206(d)(1) since petitioner has not been found to have breached any fiduciary duty to the pension plans." *Guidry* at 686. The Court also noted that under the proscriptions of § 206(d)(1):

> courts should loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified bu [sic] the statutory text . . . A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be especially inequitable. The impracticality of defining such a standard reinforced our conclusion that the identification of any exception should be left to Congress. *Guidry* at 688.

In *McLaughlin v. Lindemann, Herberger & Shaunbaum,* 853 F.2d 1307 (5th Cir. 988), Lindemann was the trustee of a pension plan who breached his obligations to the plan and Theodore Shaunbaum, was held liable, "as a 'nonfiduciary' who knowingly participated in the trustee's breach" of [his] fiduciary duty to the plan." *McLaughlin* at 1309 (5th Cir. 1988). The district court permitted the plan to offset payments owed to Shaunbaum based on his knowing participation in the misconduct that had harmed the plan. However, the Court did not permit payments owed to Bernice Shaunbaum (Theodore's ex-wife) to be offset against Theodore's breach because "to permit the Trustee to offset the payments due to Bernice against the post-divorce judgment against Theodore would conflict with" Texas community property law.

The Fifth Circuit reversed and held that an offset was not permitted against Theodore Shaunbaum. The Court distinguished the facts from those presented in *Crawford v. La Boucherie Bernard,* 815 F.2d 117 (U.S. App. D.C. 1987), where the D.C. circuit had permitted an offset predicated on a breach of fiduciary duty by a plan trustee, noting, "whether the holding in *Crawford* was proper is a matter we need not decide, Lindemann, not Shaunbaum, was trustee if the Pension Plan when" the breach occurred. *McLaughlin* at 1309.

Herberger v. Shaunbaum, 897 F.2d 801 (5th Cir. 1990), involved many of the same "participants" as those in *McLaughlin.* In *Herberger,* however, a third party sought to recover salary and bonuses from his Pension Plan claiming that he had earned them while employed by Grayson Company – a company owned by Shaunbaum, Carp (another individual) and the Pension Plan. The Pension Plan settled with the third party and a state court

later awarded the Plan a $20,000 indemnification judgment against Shaunbaum. When it could not collect the judgment outright from Shaunbaum, the Plan sought to offset its outstanding judgment against Shaunbaum's monthly pension benefits. The federal district court allowed the offset.

On appeal, the Fifth Circuit reversed and held that the anti-alienation provisions of ERISA precluded an offset against a participant's pension interest in a plan covered by ERISA based on the participant's beach of fiduciary duty to the same plan. In its decision, the Court distinguished the holding in *Guidry* from that of *Crawford v. La Boucherie Bernard,* 815 F.2d 117 (U.S. App. D.C. 1987), where the court carved out an exception to the anti-alienation rule and allowed a judgement predicated on a breach of fiduciary duty by a plan trustee to be offset against the trustee's pension benefits. Explaining its decision to follow the decision of *Guidry* and depart from the Court's holding in *Crawford,* the Fifth Circuit offered the following justifications: (1) the *Crawford* court's reliance on ERISA's legislative history to create an exception for trusts out of the anti-alienation provisions was not persuasive, (2) the jurisprudence relied on in *Crawford* was rejected by the Court in *Guidry,* and (3) the fact that Congress amended the ERISA statute to allow an exception to the anti-alienation rule for QDRO's, suggests that Congress will create exceptions where it sees fit and the courts should not do so on their own accord.

However, in another post-Guidry case, *Coar v. Kazmir,* 990 F.2d 1413 (1993), the Third Circuit agreed with the D.C. Circuit and held that ERISA anti-alienation provisions did not preclude pension plan trustees from withholding vested pension benefits from a beneficiary who

was also a former trustee through a set off to recover damages incurred by the beneficiary's breach of fiduciary duty to the plan. In allowing the offset, the Third Circuit distinguished *Guidry* and *Herberger* and reasoned in part that: (1) nothing in the ERISA anti-alienation provisions suggests that Congress intended that provision to limit the equitable remedies afforded to beneficiaries under § 409(a), (2) because the anti-alienation provisions are intended to protect plan beneficiaries by ensuring that assets are used only for the payment of benefits, Congress's intent would be undermined by an interpretation that allowed further payments to one who had already "looted" the fund rather than preserving it for the beneficiaries use, and (3) given § 409(a)'s mandate that trustees must undo any harm they have done to the pension plan and the absence of any language in § 206(d)(1) or its legislative history limiting the range of options granted to the courts in ERISA, it is unlikely that Congress intended the anti-alienation provisions to dilute potential relief available to pension beneficiaries.

The Court further distinguished *Guidry* explaining that in that case, the Court had been called to reconcile provisions of conflicting statutes (ERISA and the Labor Management Reporting and Disclosure Act "LMRDA") and it held that there was no justification for one of the statutes to override the other. In *Coar,* however, the Third Circuit reasoned that when faced with conflicting provisions of the *same* (ERISA) statute, there was no legislative history to support the assumption drawn in *Herberger* that § 206(d)(1) should override or limit the remedies available under § 409(a).

While this Court is aware of the cautioning language used by the Supreme Court in *Guidry* and interpretation

of that case in *Herberger,* this Court finds the facts of this case distinguishable from the earlier cases. For example, in *Guidry,* the petitioner stole funds from the union, but not the retirement plans themselves. In *McLaughlin,* the petitioner was a "non-fiduciary" who had knowledge of a breach of the trustee's fiduciary duty to the plan – but did not actively commit any breach himself. Similarly, *Herberger* dealt with a fiduciary's liability to a third party seeking bonuses and salaries earned during his employment and the ability of the fiduciary's Pension Plan to recover, through an offset, the money it was required to pay the third party. In none of these cases has any court been presented with a factual scenario in which a fiduciary breached his duty to the plan itself, stole *more* money than he would be entitled to under his pension plan, and then claimed entitlement to even *more* retirement funds from the plan (whether the funds be for himself or his spouse).

Furthermore, this Court notes that one of the purposes of ERISA was to protect *all* beneficiaries of a retirement plan. To allow plaintiff, in essence, to receive double benefits under the plan could penalize innocent beneficiaries and would defy common sense and the fundamental protections under ERISA. As defendants succinctly argued:

> [T]he reality of the situation is that Stanley Gaudet has already received all of the benefits that he accrued under the NPF, plus a great deal more. Hence, no pension benefits (past, present, or future) are owed to Stanley Gaudet by the NPF. This reality is not altered by the fact that Stanley Gaudet imprudently decided to distribute the pension funds to himself long before he retired and may have squandered all of those

> monies on gambling trips to Las Vegas. Opposition to Motion for Summary Judgment, p. 11.

This Court agrees with defendant's position and holds that it would be ludicrous and entirely inequitable to require defendants to pay plaintiff pension benefits when he has already taken more than he would be owed under the plans. Furthermore, this Court is mindful of its power under § 1109(a) to hold a fiduciary liable for a breach of his fiduciary duty to a pension plan and to impose whatever "other equitable or remedial relief" it deems appropriate. Given the facts presented in this case and emphasizing that plaintiff has already received more than his pension entitlement, this Court holds that because Stanley is not entitled to any pension funds, Audrey has no claim against the Pension Plans for any derivative benefits.

In *Herberger,* as well as the other cases discussed herein, the respective courts characterized the nature of the dispute as an attempt to offset one debt ostensibly owed for another debt owed to the opposing party. The petitioner in *Herberger,* for example, allegedly had vested rights in a Pension Plan and claimed he was entitled to his funds from it. Because he had breached a fiduciary duty to the Plan, its representatives claimed petitioner owed the Plan for damages it had incurred – creating the classic offset paradigm. The case at bar is again factually distinguishable. The defendant, NPF, does not have any financial obligation to pay Stanley Gaudet any funds from his pension plan. That obligation was discharged when Mr. Gaudet embezzled the amount due him many times over. Therefore, he has received and expended his pension funds, albeit illegally, and there is nothing left to pay. Thus, unlike *Herberger,* there is no offset and the rationale of that case is not applicable.

This Court is also keenly aware of state community property law that entitles each spouse to one half of all "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse." Louisiana Civil Code Article 2338. Retirement benefits earned by the employee spouse during the existence of the legal regime are no exception to that rule. *See for example Sims v. Sims,* 358 So.2d 919 (La. 1978). The QDRO at issue in this case correctly vested Audrey with the right to a half of any pension benefits owed to Stanley. In *McLaughlin v. Lindemann, Herberger & Shaunbaum,* 853 F.2d 1307 (5th Cir. 1988), the district court did not permit a Pension Plan to offset a wife's claim to a half of her husband's retirement benefits against damages owed by her husband for his breach of fiduciary duty. However, in that case, there was no allegation that the husband had already received more than his pension plan permitted during their marriage. It is the position of this Court that Stanley has already received and spent his pension benefits. Therefore, as noted above, it would be illogical and unfair to the NPF and its participants to allow Stanley to receive even more funds from the plan. If Audrey indeed does have clean hands, her remedy should be against Stanley and not the Pension Plans.

The LUCPF Pension Plan

Furthermore, this Court also holds that plaintiff's partial motion for summary judgment should be denied pending fulfillment of all administrative remedies imposed by the LUCPF plan. The Fifth Circuit's reasoning in *Bourgeois v. Pension Plan for the Employees of Santa Fe International Corporations,* 215 F.3d 475 (5th Cir. 2000), clearly holds that an employee's failure to exhaust administrative

remedies could not be excused on grounds of futility. The Fifth Circuit has indicated that futility may be established only when the plan administrator is hostile or biased against the claimant. *Denton v. First Nat. Bank of Waco,* 765 F.2d 1295 (1985). Furthermore, the Court explained in *Meza v. General Battery Co.,* 908 F.2d 1262 (5th Cir. 1990), that plaintiffs seeking ERISA plan benefits are bound by the plan's administrative procedures and must use them before filing suit even if they have no notice of what those procedures are.

Plaintiff has not persuaded this Court that his adherence to administrative remedies is futile under the analysis provided by the Fifth Circuit. Therefore, plaintiff's Partial Motion for Summary Judgment against LUCPF is **DENIED**.

Accordingly, it is **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment (rec.doc. 18) against NPF and LUCPF will be **DENIED** and summary judgment rendered in favor of NPF and LUCPF unless plaintiff can come forward within 10 days from the entry of this order and present some argument not previously made. Additionally, the Court defers on Plaintiffs' Motion for Summary Judgment as to Counterclaims Against Audrey Gaudet (rec. doc 17) until the Partial Motion for Summary Judgment is resolved.

New Orleans, Louisiana, this 27th day of November 2001.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT
COURT JUDGE

216 F. Supp. 2d 582

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STANLEY J. GAUDET and AUDREY CHAIX GAUDET	**CIVIL ACTION**
VERSUS	**NO. 01-0718**
SHEET METAL WORKERS' NATIONAL PENSION FUND, THE SHEET METAL WORKERS' LOCAL UNIONS and COUNCILS PENSION FUND, and THE NEW ORLEANS SHEET METAL WORKERS' LOCAL UNION No. 11 PENSION FUND	**SECTION "K"(5)**

ORDER AND REASONS

(Filed Mar. 13, 2002)

Before this Court is plaintiffs' Response to this Court's Order (rec. doc. 35) rendered November 28, 2001 in which the Court: (1) denied plaintiff's Motion for Partial Summary Judgment (rec. doc. 18), (2) deferred ruling on plaintiffs' Motion for Summary Judgment as to Counterclaims Against Audrey Gaudet (rec. doc 17), (3) advised plaintiffs that it intended to enter judgment sua sponte in favor of defendants, and (4) directed plaintiffs to, within 10 days from the entry of the order and reasons, present any other arguments or evidence that it had in its possession to oppose such a motion in accordance with Fifth Circuit's decision in *Nowlin v. Resolution Trust Co.*, 33 F.3d 498, 504 n.9 (5th Cir. 1994) stating that, "[d]istrict courts may grant summary judgment sua sponte, 'so long as the losing party was on notice that she had to come forward with all of her evidence.'"

After a reviewing plaintiff's response and defendant's reply briefs, this Court affirms its original order and **DENIES** plaintiff's motion for summary judgment. Furthermore, plaintiff's (1) Motion for Summary Judgment as to Counterclaims Against Audrey Gaudet (rec. doc. 17), (2) Motion for Partial Summary Judgment (rec. doc. 31) and (3) Motion to Abstain (rec. doc. 32) are **DENIED** as moot.

Background

The facts and procedural history surrounding the instant matter were laid out in this Court's original opinion of November 28, 2001 and are included in this opinion for ease of reference. Plaintiffs allege that they are entitled to pension benefits that were earned by Stanley during his employment as a sheet metal worker. Named as defendants in this matter include: (1) the Sheet Metal Workers' National Pension Fund (NPF), (2) the Sheet Metal Workers' Local Unions and Councils Pension Fund (LUCPF), and (3) the New Orleans Sheet Metal Workers' Local Union No. 11 Pension Fund (Local 11). However, the Local 11 has since merged into the NPF. (Plans 1 and 3 will be collectively referred to in the Court's analysis as NPF)

Stanley was employed in the sheet metal trades in 1946 and became a member of the executive board of the Local 11 Union and served as its president. Between 1983 and 1989, Stanley embezzled funds from the Local 11 Union and its employee benefit plans. On March 21, 1991 Stanley pled guilty to 22 counts of embezzlement and theft and was sentenced to 18 years and 5 months in prison. The district court ordered Stanley to pay restitution in the

amount of $2,750,538.87 to the Sheet Metal Workers' International Association. To satisfy this amount, the district court ordered Stanley to relinquish the pension funds to which he was entitled. Stanley argued on appeal that the anti-alienation provisions of ERISA prevented the district court from ordering him to relinquish his pension to fulfill the restitution amount, but because he did not object to the court's order at his sentencing, on appeal the Fifth Circuit upheld the district court's ruling under the "plain error" standard. *United States v. Gaudet,* 966 F.2d 959 (1992).

Audrey has alleged that she had no knowledge of Stanley's illegal actions and explained that Stanley used the embezzled funds to pay his separate gambling debts and other separate expenses that did not inure to her benefit. Defendants, however, maintain that Audrey had knowledge of and benefitted from the substantial amount of money Stanley embezzled during their marriage. Audrey also contends that any amount of his pension fund Stanley was required to forfeit as restitution did not affect her half of the funds.

Stanley and Audrey have maintained their matrimonial domicile in Louisiana since they were married in March 1968. From March 1968 to May 2001 they lived in a community property regime. On May 14, 2001, plaintiffs entered into a Separation of Property Agreement approved by the state district court. The court's order purportedly fulfilled all requirements necessary to create a valid Qualified Domestic Relations Order (QDRO) and established Audrey as an "alternate payee" of half of Stanley's pension benefits. Specifically, the order establishing the QDRO held:

> . . . that Audrey Gaudet is hereby recognized and is declared to be entitled to one-half of the pension benefits **guaranteed to Stanley J. Gaudet** by those certain pension plans established in his favor by the Sheet Metal Workers' Local Union No. 11 Pension fund . . .
>
> . . . that Audrey Gaudet is hereby declared to be entitled to one-half of all pension benefit payments **due and payable to Stanley Gaudet** by The Sheet Metal Workers National Pension Fund, and The New Orleans Sheet Metal Workers' Local Union No. 11 Pension Fund from March 1, 1991 to the date of the signing of this judgment. Subsequent to the entry of this judgment, Audrey shall be entitled to receive one-half of all pension benefits **due and owing to Stanley J. Gaudet** until the time of his death . . .

Through the QDRO, Audrey claims to be the beneficiary of a half of the benefits that accrued to Stanley under the plans administered by defendants. The court's order presupposes that funds were "due and owing" to Stanley.

Even though he embezzled from its pension plans, Stanley applied for retirement benefits from the Local 11. However, the Local 11 denied his request and explained that it would be a breach of fiduciary duty to pay a pension benefit to an individual who had already taken an amount of money that exceeded what he would be owed in pension benefits. Plaintiff appealed the denial of benefits and requested reconsideration, but his request was denied on August 30, 1991. The record also states that in 1992, the NPF sent Stanley the requisite forms required to receive benefits and requested that they be returned in thirty days, but he never responded.

Stanley also applied to the LUCPF for retirement benefits during his prison term. The LUCPF directed him to complete and return certain forms within thirty days to be eligible for benefits, but he did not return them. After the entry of the state court judgment creating the QDRO, the LUCPF determined that the QDRO was not valid because it required payment of funds it was not legally required to disperse because Stanley had not complied with all administrative steps. Plaintiffs are entitled to an administrative appeal from that decision but have chosen to bypass that remedy.

The NPF also brought a civil action against plaintiff in the Eastern District (captioned *William Mazur, et al. v. Stanley Gaudet,* Civil Action No. 89-2723) to recover losses resulting from Stanley's wrongful conversion of plan assets. On May 26, 1994 the court entered judgment in favor of the NPF against Stanley for $18,028,924 plus prejudgment interest running from September 30, 1993 through the date of the entry of judgment.

Procedural History

Actions and Arguments Raised in First Proceeding Before the Court

Plaintiffs filed the instant suit to require defendants to pay benefits allegedly owed to them and sought damages for (1) past due benefits, future benefits, interest, attorney fees and any other equitable relief, (2) bad faith breach of contract, (3) damages for mental anguish, lost income, and other damages for wrongful deprivation of benefits due them, (4) unjust enrichment and, (5) unlawful seizure of pension benefits.

In response, NPF lodged a counterclaim against plaintiffs seeking: (1) to offset pension funds owed to Stanley by NPF because he had embezzled an amount of money that exceeded what he would have otherwise been entitled to under his plan, (2) to require Audrey to restore to NPF any and all amounts she benefitted from as a result of Stanley's embezzlement, (3) an order from this Court that the anti-alienation provisions of ERISA did not prevent the offset of Stanley's pension benefits, (4) a declaration from the Court that no Louisiana law would prevent NPF from offsetting Stanley's pension, and (5) a judgment from the Court that the QDRO entered on behalf of Audrey was unenforceable.

Subsequently, plaintiffs filed a Partial Motion for Summary Judgment: (1) seeking declaration that Audrey was entitled to benefits from defendants as an alternate payee under the QDRO issued by the Twenty Ninth Judicial District for St. Charles Parish and (2) arguing that exhaustion of administrative remedies provided under the LUCPF plan would be futile. However, NPF claimed that plaintiff's Partial Motion for Summary Judgment was moot because Audrey's rights under the QDRO were purely derivative of Stanley's rights to receive pension funds from the plan and Stanley was not entitled to receive any funds under the plans. Defendant (LUCPF) also asserted that were [sic] material issues of fact sufficient to justify denial of the Partial Motion for Summary Judgment because Audrey Gaudet failed to exhaust the administrative remedies required to receive benefits.

Plaintiffs also filed a Motion for Summary Judgment as to the counterclaims against Audrey Gaudet and asserted generally that: (1) the second and fifth counterclaim were governed by the civil enforcement provisions of

ERISA and (2) because they were extinguished by the statute of repose, defendant should not be permitted to use them to offset NPF's obligation to pay Audrey under the terms of the QDRO. *See* 29 U.S.C. § 1132 and *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

The NPF, however, contended that there were issues of material fact sufficient to defeat the plaintiffs' Motion for Summary Judgment and argued that: (1) the counter claims may not be extinguished because 29 U.S.C. § 1113 limits the period during which an action may be commenced with respect to a fiduciary's breach of any responsibility, duty or obligation under Part 4 of ERISA, (2) while civil actions commenced under Title I of ERISA are enumerated in 29 U.S.C. § 1132(a), not all of those listed relate to Part 4, (3) the Court must examine the *nature of the civil action* under 29 U.S.C. § 1132(a) in order to determine whether it is an action with respect to a fiduciary breach or violation of Part 4, (4) the second counterclaim should be regarded as an act in recoupment that did not arise until plaintiffs filed the instant action to recover benefits and, and (5) ERISA's Treasury Regulations recognize the validity of recoupment and posit that a counterclaim in the nature of recoupment is never time barred by the statute of limitations as long as the main action itself is timely.

This Court's Initial Decision and Parties Post-Decision Arguments

In its original decision, this Court noted that the factual scenario of this case was distinguishable from others previously considered in this Circuit. Before

announcing its resolution of the matter, the Court addressed the relevant jurisprudential history. First, the Court noted that in *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990), the Supreme Court had determined that while 29 U.S.C. § 409(a) may provide relief for a breach of a fiduciary duty to a *plan*, it was not applicable to the case before it because the plaintiff had breached his fiduciary duty to the *union* (not the *plans*). Therefore, the Court deferred on deciding whether 29 U.S.C. § 409(a)'s imposition of liability on a breaching fiduciary to "make good" any losses suffered by a plan because of the breach serves as an exception to 29 U.S.C. § 209(d)(1) – which prohibits assignment or alienation of benefits under a plan. However, the Court cautioned that courts should "loath to create equitable exceptions to legislative requirements . . . ".

This Court also noted that in *McLaughlin v. Lindemann,* 853 F.2d 1307 (5th Cir. 1988), the Fifth Circuit held, in part, that ERISA precluded an offset to recover a judgment against a non-fiduciary for his participation in the breach of a fiduciary duty by a plan trustee. And, in *Herberger v. Shanbaum,* 897 F.2d 801 (5th Cir. 1990), the Court determined that the anti-alienation provisions of ERISA precluded an offset against a participant's pension interest in an ERISA plan based on the participant's beach of fiduciary duty to the same plan. The Fifth Circuit went on to distinguish the facts before it from those presented in *Crawford v. La Boucherie Bernard,* 815 F.2d 117 (U.S. App. D.C. 1987), in which that court had carved out an exception to the anti-alienation rule and allowed a judgment predicated on a breach of fiduciary duty by a plan trustee to be offset against the trustee's pension benefits. Specifically, the *Herberger* Court declined to follow

Crawford because: (1) the *Crawford* court's reliance on ERISA's legislative history to create an exception for trusts out of the anti-alienation provisions was not persuasive, (2) the jurisprudence relied on in *Crawford* was rejected by the Court in *Guidry,* and (3) the fact that Congress amended the ERISA statute to allow an exception to the anti-alienation rule for QDRO's, suggests that Congress will create exceptions where it sees fit and the courts should not do so on their own accord.

This Court also explained that other Circuits have wrestled with the issues presented herein including the Third Circuit in *Coar v. Kazimir,* 990 F.2d 1413 (1993) in which that Court held, as the Court did in *Crawford,* that ERISA anti-alienation provisions did not preclude pension plan trustees from withholding vested pension benefits from a beneficiary who was also a former trustee through a set off to recover damages incurred by the beneficiary's breach of fiduciary duty to the plan.

While this Court was aware of the cautioning language used by the Supreme Court in *Guidry* and the interpretation of that case in *McLaughlin* and *Herberger,* this Court found those cases distinguishable. For example, the petitioner in *Guidry* stole funds from his union, but not the plans themselves. In *McLaughlin,* the petitioner was a "non-fiduciary" who had knowledge of a breach of a trustee's fiduciary duty to the plan – but had not actively committed any breach himself. Similarly, *Herberger* dealt with a fiduciary's liability to a third party seeking bonuses and salaries earned during his employment and the ability of the fiduciary's pension plan to recover, through an offset, money it was required to pay the third party. In none of the cases, then, has any court been presented with a factual scenario in which a fiduciary breached his duty

to the *plan itself,* appropriated to himself *more* money than he would have been entitled to under his pension plan, and then claimed entitlement to even *more* retirement funds from the plan (whether the funds be for himself or his spouse).

Furthermore, the Court emphasized that the *Herberger* Court characterized the nature of the dispute before it as an attempt to "offset" one debt ostensibly owed to the opposing party for another debt. The petitioner in *Herberger,* for example, allegedly had vested rights in a pension plan and claimed he was entitled to his funds from it. Because he had breached a fiduciary duty to the plan, its representatives claimed petitioner owed the plan for the damages it had incurred – creating the classic offset paradigm. In the instant case, however, this Court reasoned that NPF does not have any financial obligation to pay Stanley Gaudet funds from his pension plan as that obligation was discharged when Mr. Gaudet embezzled the amount due him many times over. Because plaintiffs received and expended the entirety of the pension funds owed to Stanley, albeit illegally, the Court concluded there was no offset to be made and the rationale of *Herberger* was inapplicable.

This Court also noted that one of the purposes of ERISA was to protect *all* beneficiaries of a retirement plan. To allow plaintiff, in essence, to receive double benefits under the plan could penalize innocent beneficiaries and would defy common sense and the fundamental protections under ERISA. Thus, the Court determined that it would be ludicrous and entirely inequitable to require defendants to pay plaintiff pension benefits when he had already taken more than he would be owed under the plans.

Given the facts presented in this case and emphasizing that plaintiff had already received more than his pension entitlement, the Court held that because Stanley was not entitled to any pension funds, Audrey had no claim for derivative benefits. The Court noted that it was mindful of: (1) state community property law that entitles each spouse to one half of all "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse." Louisiana Civil Code Article 2338 and (2) the Fifth Circuit's decision in *McLaughlin v. Lindemann, Herberger & Shaunbaum*, 853 F.2d 1307 (5th Cir. 1988), which prohibited a pension plan from offsetting a wife's claim to a half of her husband's retirement benefits against damages owed by her husband for his breach of fiduciary duty. However, the Court found *McLaughlin* distinguishable because there had been no allegation that the husband in that case had already received more than the amount of his pension during their marriage. Therefore, the Court concluded that while Audrey certainly has a vested one half interest in the plan funds earned by her husband during their marriage, Stanley already received the *totality* [sic] those funds through his embezzlement – including her interest in them.

Finally, this Court held that plaintiff's partial motion for summary judgment as to the plan funds from the LUCPF should be denied pending fulfillment of all administrative remedies imposed by the LUCPF plan. The Court noted that its decision was consistent with Fifth Circuit law and relied in part on the reasoning in *Bourgeois v. Pension Plan for the Employees of Santa Fe International Corporations,* 215 F.3d 475 (5th Cir. 2000) and *Denton v. First Nat. Bank of Waco,* 765 F.2d 1295 (5th Cir. 1985), in which the Court determined that an employee's failure to

exhaust administrative remedies could not be excused on grounds of futility unless there was some demonstration that the plan administrator was hostile or biased against the claimant. Similarly, in *Meza v. General Battery Co.*, 908 F.2d 1262 (5th Cir. 1990), the Court held that plaintiffs seeking ERISA plan benefits are bound by the plan's administrative procedures and must use them before filing suit even if they have no notice of what those procedures are.

The Court concluded its opinion by advising plaintiffs that it intended to deny its pending Motion for Summary Judgment and Motion for Partial Summary Judgment and render summary judgment in favor of the defendants and afforded plaintiffs ten days to present any new arguments to explain why summary judgment should not be rendered against them sua sponte.

Plaintiff's Response to Court's Order of November 28, 2001

In its response memorandum, plaintiff raised several arguments urging this Court not to grant summary judgment in defendants' favor. First, plaintiffs argued that the restitution order entered by the district court and upheld by the Fifth Circuit in the criminal portion of this case *United States v. Gaudet,* 966 F.2d 959 (5th Cir. 1992) was void because it contravened the anti-alienation provision of ERISA, was for an illegal amount, improperly awarded restitution to a party that had already received compensation (because NPF has allegedly been reimbursed for the amount taken by plaintiff), and illegally divested Audrey of her one half in Stanley's pension.

Next, plaintiffs reasoned the Court was without power to "offset" Stanley's pension benefits in favor of defendants based on his breach of fiduciary duties to their plans. Specifically, plaintiffs noted that it was not until August 7, 1997, that Congress amended ERISA at 29 U.S.C. § 1056(d)(4)(i) and (ii) to permit an exception to the anti-alienation rule and allow an "offset" in favor of a pension plan when a plan member has been ordered to pay the plan: (1) under a judgment of conviction for a crime involving the plan or (2) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of the subtitle. Plaintiffs explained that this amendment to ERISA created a new cause of action that did not exist at the times relevant to this litigation and posited that Congress intended the amendment to apply to transactions *after* its enactment. For this proposition, plaintiffs cited language from the Congressional Record stating that the "amendment is effective for judgments, orders and decrees issued, and settlement agreements entered into, on or after the date of enactment." 143 Cong. Rec. H. at 6604. Because the judgment in the civil action by the NPF against Stanley occurred on May 26, 1994 and the restitution order against Stanley in favor of NPF in the criminal proceedings was entered on July 24, 1991, plaintiffs argued that this Court did not have authority to render an "offset" in favor of the NPF and against Stanley's pension.

Plaintiffs also contended that this Court improperly interpreted 29 U.S.C. § 1109, which permits district courts to render "equitable relief" to pension plans when a party has caused losses to the plan, to trump the anti-alienation provisions of 29 U.S.C. § 1056. Instead, plaintiffs reasoned

that when read *in pari materia,* the ERISA provisions did not, prior to the 1997 amendments, intend the "equitable relief" provision of § 1109 to eviscerate the forcefulness of the anti-alienation clause of the same statute.

Furthermore, plaintiff's argued that the Court's original opinion created an inequitable result because: (1) NPF has already been reimbursed the damages it incurred through its insurer (F&D) and to permit NPF to utilize the restitution order to reduce money owed to plaintiff would permit NPF to "double dip," (2) the opinions in *Guidry* and *Herberger* considered the relationship between liability under § 1109 and anti-alienation under § 1056 and did not permit the district courts to offset pension funds owed to a plan member because of a breach of fiduciary duty by that member to the plan, (3) the facts of the instant case are indistinguishable from *Guidry* and *Herberger,* and (4) it contravenes Louisiana community property law to divest Audrey of her one half interest in the pension plan funds.

Finally, plaintiffs alleged that exhaustion of administrative remedies under the LUCPF plan would be futile and emphasized that the its [sic] plan's description of the appeal process was insufficient because it does not specify the means by which an appeal is to be taken, the manner that the appeal will be adjudicated, or the time frame for such an appeal and decision.

Defendant, NPF's, Response to Court's Order of November 28, 2001

In its response to the Court's November 28, 2001 order, defendant, NPF, argued primarily that the Court's grant of summary judgment in its favor would not violate ERISA because it would not constitute an "assignment or

alienation" prohibited by 29 U.S.C. § 1056(d). Defendant based its argument on its interpretation of Treasury Regulation, 26 C.F.R. § 1.401(a)-13(c)(2)(iii), which provides that "any arrangement for the recovery of overpayments previously made to a participant does not constitute an assignment or alienation." Because Stanley already received more than NPF would have owed him upon retirement, NPF reasoned that it should be entitled to make arrangements to recoup the overpayment. Thus, NPF characterized this action as a "recoupment of prior overpayments to a participant" and not and [sic] "assignment or alienation" prohibited by § 1056.

NPF also explained that its pension plan only permits a participant to receive one type of pension and prohibits a participant from receiving two pensions. Were this Court to grant summary judgment in plaintiffs' favor, Stanley would receive, in essence, two pensions because he already took funds from the plan that total more than his pension would have been worth. Succinctly, defendant explained that:

> [I]t strains credulity and logic to believe, as plaintiffs assert, that ERISA's anti-alienation and assignment rules preclude the NPF from refusing to make any additional payments to Stanley Gaudet when he has already received payments well in excess of any pension benefits to which he was entitled under NPF's governing plan documents.

Thus, it is NPF's position that future payments to Stanley Gaudet would be "grossly inequitable."

LUCPF also filed a reply brief solely to attach its Summary Plan Description as an exhibit to demonstrate

the specific appeal procedures that plaintiffs must take to be eligible to receive their benefits (rec. doc. 43, Ex. A at 22-24). In a subsequent response (rec. doc. 45), however, plaintiffs have argued that the attachment of the Summary Plan Description was inappropriate because it should have been served within ten days of the hearing date on plaintiffs motion. Furthermore, plaintiffs posit that the Summary Plan Description is still insufficient because it does not show exactly what committees will hear appeals or demonstrate that an impartial body will adjudicate plaintiffs' grievances.

ANALYSIS

The issue before the Court is whether plaintiffs have presented sufficient issues of fact to convince the Court that it should not grant summary judgment sua sponte in favor of defendants, NPF and LUCPF. After reviewing the memoranda and relevant law, this Court holds summary judgment should be rendered in favor of NPF and LUCPF.

First, the Court emphasizes that plaintiffs' characterization of its decision to grant summary judgment in favor of NPF as an impermissible "offset" is inaccurate. As noted in this Court's November 28, 2001 opinion, an "offset" can not exist when only *one* of two parties owes an obligation to the other. In the case at bar, NPF does not have any obligation to pay Stanley pension funds that would otherwise be due to him because that duty was discharged when Stanley embezzled funds from NPF in an amount greater than his pension would have been worth. Thus, the Court's decision merely prohibits Stanley from "*double dipping*" into NPF's plan funds as the NPF is no longer indebted to plaintiff for payment of his pension.

This analysis was also endorsed by the Ninth Circuit in *Parker v. Bain,* 68 F.3d 1131, 1141 (9th Cir. 1995) when it reasoned, in part, that a plan participant forfeited his right to receive pension when his earlier breach of fiduciary duty to the plan had afforded him more funds than his pension was otherwise worth. Specifically, the Court stated:

> The district court properly determined that Parker [the petitioner] no longer has any interest in the Plan: Parker was a de facto fiduciary when he exercised control over Plan accounts; his embezzlement of those funds constituted a fiduciary breach, and the damages he owes to the Plan as a result of that breach exceed any money the Plan owed him. His interest in the Plan is extinguished. Parker therefore, has no colorable claim for benefits . . .

That same analysis leads this Court to conclude that the 1997 amendments to 29 U.S.C. § 1056(d) are inapplicable to the case at bar. Those amendments permit a district court to "offset" a participant's benefits under a pension plan when the participant is required to pay damages to the plan pursuant to a criminal or civil judgment arising after the enactment of the amendments. However, because there is no "offset" to be made against plaintiff in favor of NPF (as plaintiffs have already received the funds they otherwise would have been entitled to under the plan), the instant case falls outside of the scope of the amendments. Clearly, if Gaudet's defalcation had been a breach of fiduciary duty affecting the plan, other than prematurely distributing to himself monies far exceeding his vested interest, the 1997 amendments would be applicable.

Furthermore, plaintiffs' reliance on *Guidry* and *Herberger* is misplaced. As the Court explained its original opinion, the facts and holding of *Guidry* are distinguishable from the instant case as they reflect a situation in which a petitioner breached his fiduciary duty to the *union* and not its *pension plans.* Similarly, the facts of *Herberger* are dissimilar as the petitioner in that case caused damage to his pension plan through a breach of fiduciary duty, but had not personally taken funds from the plan that totaled more than his pension was worth. Thus, neither the Supreme Court in *Guidry* nor the Fifth Circuit in *Herberger* was presented with the argument lodged in the instant case – that the petitioner already received the amount of his pension through his breach of fiduciary duty to the plan.

This Court also notes that under the terms of the NPF pension plan, "a person shall be entitled to only one pension." (NPF Opposition, p. 55, Section 5.12). Plaintiff, through his own illegal actions, took funds from his pension plan that equaled more than the amount that he would have been entitled to under his plan. To require NPF to provide plaintiff with more funds, now that he is legally eligible to receive them, would be to afford him a second pension – a situation that no plan member is permitted to enjoy. Such a result could threaten other member's funds and flies in the face of common sense. As the district court noted in *Friedlander v. Doherty,* 851 F.Supp. 515, 522 (N.D. New York 1994), ERISA is set up in part to protect pensioners from misuse and mismanagement of funds and it is improper to permit a plan trustee, who prematurely withdrew funds from his pension plan, to later claim entitlement to more pension benefits and

"invoke the protection of the anti-alienation provision and reap a windfall at the expense of other plan beneficiaries."

The Court notes, as it did in the original opinion, that while Audrey has an interest in one half of Stanley's pension benefits earned during the existence of the community, her right to those benefits is contingent upon Stanley being entitled to receive them. Because the Court has determined that Stanley already received his pension funds and is not entitled to any additional money from the NPF. Audrey's cause of action for her one half interest should be against Stanley – who through his own actions reaped the entirety of his pension benefits before they were due. Again, requiring the NPF to dole out funds to fulfill Audrey's one half interest in a pension plan that her husband already appropriated to himself would be improper and could potentially harm other plan participants.

Finally, the Court notes that its decision does not incorporate defendant's argument that Treasury Regulation C.F.R. § 1.401(a)-13(c)(2)(iii) is applicable to the case at bar. That regulation provides that the ERISA proscriptions against assignment and alienation of pension funds do not apply to "an arrangement for the recovery by the plan of overpayments of benefits previously made to a participant." However, because the matter before the Court does not involve "an arrangement or settlement by which" defendants can recoup funds from plaintiffs, that statute is inapplicable. Granting summary judgment in favor of defendants only prohibits plaintiffs from receiving more pension benefits from defendants. It is not to be construed as a judgment entitling defendants to recover funds from plaintiffs. Those issues were addressed in the prior criminal and civil proceedings between the parties.

As noted above, this Court determined in its original decision that: (1) Audrey was required to exhaust her administrative remedies with LUCPF prior to bringing suit to enforce the QDRO she obtained in state court and (2) plaintiffs had not demonstrated fulfillment of those procedures would be futile or inadequate. After reviewing the Summary Plan Description attached by LUCPF in its reply brief, this Court is convinced that its initial decision was correct. LUCPF has set up a thorough review process which provides generally that: (1) upon 60 days of notice of denial of a claim, an applicant can request review of the decision through the plan administrator, (2) 60 days after receipt of a request for review of a denial of a claim, the Board of Trustees or a committed [sic] designated by the Board will hear the appeal and render a written decision, unless an extension of 120 days is permitted, and (3) the notice of denial of a claim by the Board shall advise the claimant that he or she has 90 days to then challenge the denial in court.

Audrey chose to bypass all administrative steps to claim entitlement to pension benefits that may stem from her QDRO in the present case and summarily argued that the LUCPF procedures were futile and inadequate. However, the Fifth Circuit has consistently required that claimants under the provisions of ERISA complete the administrative steps before utilizing the court system. *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 33 (5th Cir. 1993). The Court has required fulfillment of administrative procedures for several reasons including: (1) Congress intended ERISA trustees to be responsible for their actions, and not the federal courts, (2) requiring administrative proceedings provides a clear record for judicial review when and if it should become necessary, and (3) requiring resort to intra-plan remedies effects [sic] Congress' goal of

minimal judicial intervention as the courts will only be authorized to engage in arbitrary and capricious – rather than *de novo* review. *Brown v. Star Enterprise,* 1996 WL 450694 (1996) *citing Denton v. First Nat'l Bank,* 765 F.2d 1295, 1300 (5th Cir. 1985). Because the LUCPF administrative procedures are clearly delineated, plaintiff should act in compliance with them before requesting this Court's attention to her claim.

The Court also concludes that LUCPF's attachment of the Summary Plan Description to its reply brief filed in response to plaintiffs' Memorandum in Response to this Court's November 28, 2001 Order was procedurally proper and notes that plaintiffs were given the opportunity to file an opposition to LUCPF's reply brief. However, plaintiffs' reply did not demonstrate that they would suffer any prejudice from the attachment of the plan description.

Accordingly, Plaintiffs' Motion for Summary Judgment and Motion for Partial Summary Judgment are **DENIED** and in accordance with *Nowlin v. Resolution Trust Co.,* 33 F.3d 498, 504 n.9 (5th Cir. 1994), summary judgment is rendered sua sponte in favor of defendants, NPF and LUCPF. Plaintiffs' Motion for Summary Judgment as to Counterclaims Against Audrey Gaudet (rec. doc. 17), Motion to Abstain (rec. doc. 32) and Motion for Summary Judgment (rec. doc. 31) are **DENIED** as moot.

New Orleans, Louisiana, this 11th day of March 2002.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT
COURT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STANLEY J. GAUDET and AUDREY CHAIX GAUDET	**CIVIL ACTION**
VERSUS	**NO. 01-0718**
SHEET METAL WORKERS' NATIONAL PENSION FUND, THE SHEET METAL WORKERS' LOCAL UNIONS and COUNCILS PENSION FUND, and THE NEW ORLEANS SHEET METAL WORKERS' LOCAL UNION No. 11 PENSION FUND	**SECTION "K"(5)**

JUDGMENT

(Filed Mar. 13, 2002)

Considering the Order and Reasons entered this date,

IT IS ORDERED, ADJUDGED, AND DECREED that there be a judgment in favor of defendants Sheet Metal Workers' National Pension Fund and the Sheet Metal Workers' Local Unions and Pension Fund, against the plaintiffs, Stanley and Audrey Gaudet, dismissing plaintiff's complaint with each party to bear its own costs.

New Orleans, Louisiana, this 11th day of March 2002.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL JR.
UNITED STATES DISTRICT JUDGE

No. 03-385

IN THE

Supreme Court of the United States

STANLEY J. GAUDET, *et ux.*,

Petitioners,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SHEET METAL WORKERS' NATIONAL PENSION FUND AND NEW ORLEANS SHEET METAL WORKERS LOCAL UNION NO. 11 PENSION FUND

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QUESTION PRESENTED

Whether, based on the undisputed facts in the record, Respondent Sheet Metal Workers' National Pension Fund ("NPF") was entitled to judgment in its favor, dismissing the claims against it by Petitioners Stanley J. Gaudet ("Stanley Gaudet") and Audrey Chaix Gaudet ("Audrey Gaudet") (collectively, the "Gaudets" or "Petitioners"), because, as a matter of law, no benefits are due and owing from the NPF to Stanley Gaudet, and, therefore, Audrey Gaudet is not entitled to any benefits from the NPF under an alleged "qualified domestic relations order," as such term is defined in 29 U.S.C. § 1056(d)(3)(B)(i), which purported to assign one-half of any benefits due and owing to Stanley Gaudet from the NPF.

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26 C.F.R. § 1.401(a)-13(c)(2)(iii) 1, 17, 18

Other Authority:

Reorganization Plan No. 4 of 1978, reprinted in 1978 U.S.C.C.A.N. 9814 17

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The opinion of the district court (Pet. App. 22-42) is reported at 216 F. Supp. 2d 582. An earlier of opinion of the district court (Pet. App. 4-21) is unreported.

STATUTORY AND REGULATORY PROVISIONS

The following additional statutory and regulatory provisions are involved in this case:

1. 29 U.S.C. § 1056(d)(1), which provides:

> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

2. 26 C.F.R. § 1.401(a)-13(c)(2)(iii), which provides, in relevant part:

> (2) Specific arrangements not considered an assignment or alienation. The terms "assignment" and "alienation" do not include . . . the following arrangements:
>
> (iii) Any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant.

3. 29 U.S.C. § 1056(d)(3)(B), which provides, in relevant part:

> (B) For purposes of this paragraph —
>
> (i) the term "qualified domestic relations order" means a domestic relation order —
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
>
> (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —
>
> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

> (iii) does not require the payment of benefits to an alternate payee, which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

4. 29 U.S.C. § 1104(a)(1)(D), which provides, in relevant part:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT OF THE CASE

Respondent NPF is a defined benefit, multiemployer employee pension benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). R. 472. The NPF is administered by a joint board of trustees ("Trustees"), which has the sole discretion to interpret the plan document and determine any person's entitlement to benefits under the NPF. R. 472-473, 558.

Respondent New Orleans Sheet Metal Workers Local Union No. 11 Pension Fund ("Local 11 Pension Fund") was a defined benefit, mutliemployer employee pension benefit plan that merged into the NPF in or about 1993.[1] R. 473. Consequently, the NPF acquired all the assets, and succeeded to the rights and liabilities, of the Local 11 Pension Fund. *Id.* Before the Local 11 Pension Fund merged into the NPF, it was administered by a joint board of trustees, which had the sole discretion to interpret the plan document and determine any person's entitlement to benefits under the plan. R. 61, 473. Stanley Gaudet participated in both the Local 11 Pension Fund and the NPF, before the two plans merged. R. 473. He also served as a labor trustee of the Local 11 Pension Fund from 1974 until 1989. *See Mazur, et al. v. Gaudet, et al.*, 826 F. Supp. 188, 189 (E.D. La. 1992). While the Local 11 Pension Fund had other trustees, Stanley Gaudet essentially exercised complete control over the Local 11 Pension Fund's assets. *See id.* at 190-191.

By using an elaborate conversion scheme, Stanley Gaudet used his powers as a trustee of the Local 11 Pension Fund to distribute plan assets to himself on numerous occasions between 1983 and 1989.[2] *See United States v. Gaudet*, 966

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1. As the context requires, any reference to the NPF refers jointly to the NPF and the Local 11 Pension Fund.

2. Stanley Gaudet pled guilty in 1989 to embezzling $2,593,903.37 from the Local 11 Pension Fund and a Local 11 employee welfare benefit plan (the "Local 11 Welfare Fund") (collectively, the "Local 11 Funds"). *See Mazur*, 826 F. Supp. at 189. Additionally, in April of 1991, Stanley Gaudet pled guilty to federal charges of theft and embezzlement. *Id.* As a result of his guilty plea, the United States District Court for the Eastern District of Louisiana:

(Cont'd)

F.2d 959, 961 (5th Cir. 1992). As part of his conversion scheme, Stanley Gaudet made withdrawals from, among other things, the Local 11 Pension Fund's checking accounts or its EF Hutton investment accounts. *See Mazur*, 826 F. Supp. at 189. Instead of purchasing Certificates of Deposit ("CD") for the Local 11 Pension Fund, he would take the proceeds to a bank and obtain a certified check with which he would either purchase a CD for himself or deposit the check into a bank account that he maintained for himself. *Id.* He would then draft false safekeeping receipts to give to the Local 11 Pension Fund's administrator as a record of investments he supposedly made on behalf of the Local 11 Pension Fund.[3] *See id.*

In order to recover the losses resulting from Stanley Gaudet's unauthorized and premature distribution of plan assets to himself, a civil action under ERISA was commenced in the United States District Court for the Eastern District of Louisiana against, among others, Stanley Gaudet. The case, which was captioned *Mazur v. Gaudet, et al.*, Civil Action No. 89-2723, resulted in a judgment of $18,028,924 (plus interest and attorney's fees) against Stanley Gaudet. R. 598.

(Cont'd)

(i) sentenced Stanley Gaudet to an aggregate term of 221 months in prison; (ii) ordered him to make restitution in the amount of $2,750,538.87; and (iii) further ordered Stanley Gaudet to relinquish the pension funds to which he was personally entitled, in order to satisfy the restitution amount. *Gaudet*, 966 F.2d at 961.

3. Stanley Gaudet also employed the same scheme to embezzle assets of the Local 11 Welfare Fund, while also acting as a trustee of that plan.

The evidence submitted in the *Mazur* case shows that the actual amount of Local 11 Pension Fund assets that Stanley Gaudet distributed to himself was $4,308,524.[4] R. 600-616. Taking into account the interest that would have accrued on those distributions, the total value of those funds, as of September 30, 1993, was $16,023,198 (based on 52-week U.S. Treasury compound interest through September 30, 1993). R. 604-614. This amount represented the value, as of September 30, 1993, of the benefit Stanley Gaudet derived from the unauthorized distributions he made to himself (as well as the corresponding loss to the NPF, as the Local 11 Pension Fund's successor in interest).

In contrast, Stanley Gaudet's accrued benefit under the NPF (including the portion accrued under the Local 11 Pension Fund prior to its merger) had a present value of only $292,000 (determined as if such benefit had commenced as of March 1, 1991). R. 646. Thus, the amount of NPF assets that Stanley Gaudet distributed to himself far exceeded his entire accrued benefit under the NPF (including the pre-merger portion accrued under the Local 11 Pension Fund).

Notwithstanding the fact that Stanley Gaudet already had distributed to himself amounts far in excess of his accrued benefit, he applied for a pension from the Local 11 Pension Fund in 1991 (before its merger into the NPF). R. 642. The records of the Local 11 Pension Fund reflect that the plan's then board of trustees denied Stanley Gaudet's pension application, having determined that it would be a breach of fiduciary duty to pay him the requested pension benefit. *Id.*

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4. This exceeds the amount to which he pled guilty to embezzling in the criminal action ($2,593,903.37), and also exceeds that amount of restitution that Stanley Gaudet was ordered to make under his criminal sentence ($2,750,538.87).

Stanley Gaudet sought reconsideration of the benefit denial, but the Local 11 Pension Fund's board of trustees denied his request on or about August 30, 1991. R. 645.

On or about September 3, 1992, Ms. Marsha Gochnauer, then an employee of the NPF, forwarded to then NPF counsel Raymond Sweeney a signature form, retirement declaration form, and a benefit election form for the NPF, each of which was required to be submitted to the NPF prior to the issuance of payment. R. 634. Ms. Gochnauer included with those forms a letter addressed to Stanley Gaudet, which explained that he needed to complete and sign the enclosed forms in order to be eligible for benefits. *Id.* It was Ms. Gochnauer's understanding that former counsel Sweeney then forwarded those forms to Stanley Gaudet. *Id.* Because Stanley Gaudet failed to return the completed forms to the NPF, Ms. Gochnauer forwarded a second set of forms in 1993 by cover letter directly to Stanley Gaudet and requested that such forms be returned within 30 days. R. 634, 640.

The NPF requires an election of pension form, a signature form, and a signed retirement declaration form before issuing payment. R. 634. Nothing was received in reply to Ms. Gochnauer's letter and the NPF closed Stanley Gaudet's file. *Id.* It was Ms. Gochnauer's understanding, at all relevant times, that any benefits that the NPF would have paid to Stanley Gaudet would have been placed in escrow and returned to the NPF as restitution, pursuant to Stanley Gaudet's criminal sentence.

On or about May 17, 2001, Stanley Gaudet and Audrey Gaudet apparently obtained a Judgment of Separation of Property from the 25th Judicial District Court for the Parish of St. Charles, State of Louisiana (hereinafter, the "State

Court Order"). R. 267-268. The State Court Order purported to declare that, among other things: (i) Audrey Gaudet is to be entitled to one-half of all pension benefit payments due and payable to Stanley Gaudet by the NPF, from March 1, 1991 to the date of the signing of the judgment; and (ii) subsequent to the entry of judgment, Audrey Gaudet will be entitled to receive one-half of all pension benefits due and owing to Stanley Gaudet until the time of his death. *Id.* The NPF was not provided with notice of the state court proceedings until after the State Court Order had been entered and the Petitioners had filed an amended complaint in the instant action. R. 474.

The NPF determined that the State Court Order was not a "qualified domestic relations order" ("QDRO") within the meaning of 29 U.S.C. § 1056(d)(3)(B)(i) and notified the Gaudets' counsel of that determination on or about September 26, 2001. R. 625-626. Significantly, the NPF also noted that there was nothing due and owing to Stanley Gaudet from the NPF. R. 626. Although the Gaudets did not appeal the NPF's determination, the NPF did not press its affirmative defense that the Gaudets failed to exhaust their administrative remedies regarding the QDRO, because requiring an appeal on that issue would not have furthered the purposes of the exhaustion requirement.

The Gaudets filed a Motion for Partial Summary Judgment seeking, *inter alia*, a declaration that Audrey Gaudet was entitled to benefits from the NPF as an alternate payee under an alleged QDRO, which purported to assign to Audrey Gaudet one-half of the pension benefits due and owning to Stanley Gaudet. *See* Pet. App. 27. The NPF contended that the issues relating to the QDRO were moot, since no benefits were due and owing to Stanley Gaudet because he had already received a distribution of plan assets in excess of his accrued benefit. *See id.*

The district court advised the Gaudets that it intended to deny their motion and render summary judgment, *sua sponte*, in favor of the NPF, and the Gaudets were afforded ten (10) days to present any new arguments explaining why summary judgment should not be rendered against them. Pet. App. 21. After additional briefing by the parties, the district court entered a final judgment on March 13, 2002, which, among other things, rendered summary judgment, *sua sponte*, in favor of the NPF and dismissed the Petitioners' claims. Pet. App. 42-43. The Gaudets appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit.

Although the Gaudets argued that the district court's judgment constituted an illegal offset in violation of ERISA's anti-alienation provision, the court of appeals astutely treated the case as a denial of benefits case and thus reviewed the plan administrator's denial of benefits under the abuse of discretion standard applied by the Fifth Circuit in *Spacek v. The Maritime Assoc., I.L.A. Pension Plan*, 134 F.3d 283, 288 (5th Cir. 1988). Pet. App. 2.

The court of appeals below concluded that, in light of the large amounts Stanley Gaudet distributed to himself for his personal benefit, the plan administrator did not abuse its discretion when it denied the Gaudets' claims, based on the terms of the plan that preclude duplicate pensions. Pet. App. 3. The Gaudets failed to file timely a motion for rehearing *en banc* but did file a Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

The Petitioners do not present any compelling reasons for this Court to exercise its discretion to grant their Petition for Writ of Certiorari. There is no conflict between the court of appeals' decision below and any other United States court of appeals' decision on the same matter. The court of appeals' decision below does not depart from the accepted and usual course of judicial proceedings. Indeed, both the decisions of the court of appeals and the district court below were legally correct and well reasoned. Accordingly, the Petition for Writ of Certiorari should be denied.

I. This Case Does Not Involve A Retroactive Application Of 29 U.S.C. § 1056(d)(4)

The Petitioners contend that the plan administrator's interpretation of the relevant plan provision constituted "an improperly retroactive application" of a statutory amendment, and that the court of appeals erred by applying an abuse of discretion standard to the plan administrator's interpretation. Pet. 7. This is patently incorrect.

The statutory amendment to which Petitioners refer is 29 U.S.C. § 1056(d)(4), which was added to ERISA in 1997 and provides an exception to the rule that prohibits the assignment or alienation of pension benefits. Specifically, Congress created an exception for an offset of a participant's pension benefit against any amount that the participant is ordered or required to pay to the plan pursuant to a court order, judgment or decree, or a settlement agreement (to which the Secretary of Labor ("DOL") or Pension Benefit Guarantee Corporation ("PBGC") is a party), because of the participant's violation of ERISA or criminal violation

involving the plan. *See* 29 U.S.C. § 1056(d)(4). However, the offset is not established by the terms of a plan. Rather, the offset must be expressly provided for in the order, judgment, decree, or settlement agreement. *See* 29 U.S.C. § 1056(d)(4)(B). Moreover, the exception does not create a new cause of action or remedy under ERISA. It merely clarifies that a plan provision prohibiting an assignment or alienation of pension benefit (as required by 29 U.S.C. § 1056(d)(1)) does not apply to an offset ordered by the court or required by a settlement agreement with the DOL or PBGC. Accordingly, there is no foundation to the Petitioners' argument that the interpretation by the NPF's plan administrator involved a retroactive application of 29 U.S.C. § 1056(d)(4).

To the contrary, as the court of appeals below pointed out, the NPF determined that no benefits were due and owing to Stanley Gaudet because he had already received a distribution of plan assets that exceeded the amount he was entitled to receive as a pension from the NPF. Pet. App. 3. This is a factual determination borne out by the record. Pet. App. 3. As the district court noted in its opinion, it is inaccurate for the Petitioners to characterize the NPF's denial of benefits as an "offset," since this implies that the NPF owes an obligation to Stanley Gaudet. Pet. App. 37. No such obligation exists because Stanley Gaudet took a premature distribution of his accrued benefit by making periodic distributions of plan assets to himself over a period of several years. *See* Pet. App. 37. The amount Stanley Gaudet distributed to himself far exceeded his accrued benefit. R. 604-614, 646.

Because there was no benefit due and owning to Stanley Gaudet, the NPF's denial of Petitioners' claims does not

involve an assignment or alienation of Stanley Gaudet's pension benefit. One cannot assign or alienate something that does not exist in the first instance. As further explicated below, the NPF's determination and the court of appeals' conclusion were based on the fact that Stanley Gaudet distributed to himself, albeit illegally, plan assets well in excess of his accrued benefit. It was not based on a retroactive application of 29 U.S.C. § 1056(d)(4). Stanley Gaudet already received more than he was entitled to receive from the NPF. The mere fact that the premature distribution constituted a breach of fiduciary duty and embezzlement does not alter the factual conclusion that Stanley Gaudet already received more than the full value of his accrued benefit from the NPF. Accordingly, the NPF's determination that no benefits are due and owing to Stanley Gaudet is not based upon, and does not implicate, 29 U.S.C. § 1056(d)(4), because there is no assignment or alienation of Stanley Gaudet's pension benefit by the NPF.

II. The Court Of Appeals Applied The Proper Standard Of Review And Reached The Correct Result

A. The Plan Administrator's Conclusion was Based on a Fair and Reasonable Interpretation of the NPF's Plan Document

Under 29 U.S.C. § 1104(a)(1)(D), the NPF's Trustees must discharge their fiduciary duties regarding the payment of benefits in accordance with the terms of the NPF's plan document. The relevant terms in this case are contained in Section 5.12 of the NPF's plan document, which provides:

> A person shall be entitled to only one pension under this Plan, except that a Pensioner receiving

> a Disability Pension or an Industry-Related Disability Pension who recovers may be entitled to a different type of pension.

R. 535.[5]

A fair and reasonable reading of Section 5.12 is that it precludes a participant from receiving more than his accrued benefit under the plan (i.e., the amount he is entitled to receive as a pension). Because Stanley Gaudet already received distributions of NPF plan assets well in excess of his accrued benefit, it is reasonable for the plan administrator to construe Section 5.12 as precluding any further payment of benefits to Stanley Gaudet. To construe Section 5.12 otherwise would defy common sense and would be tantamount to providing a second pension to Stanley Gaudet, as the district court observed. *See* Pet. App. 39.

The mere fact that Stanley Gaudet distributed the plan assets to himself prematurely does not detract from the fact that Stanley Gaudet has already received distributions in excess of his accrued benefit under the NPF. Indeed, because of the time value of money, the premature nature of the distribution magnifies the value of the benefit Stanley Gaudet already received from the NPF. Thus, an application of Section 5.12 to the undisputed facts in the record ineluctably

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5. A non-duplication of pension provision also existed in Section 6.09 of the pre-merger plan document for the Local 11 Pension Fund:

> Nothing contained in this Plan shall be construed as permitting any person to be entitled simultaneously to more than one type of pension from the Pension Fund.

R. 45.

points to the conclusion that Stanley Gaudet has already received all of the benefits to which he is entitled under the NPF. The anti-alienation provision of ERISA is inapplicable, since there is no benefit left to assign or alienate.

B. The Plan Administrator Did Not Engage in Statutory Interpretation

The Petitioners are in error when they assert that the NPF's plan administrator was engaging in statutory interpretation as opposed to plan interpretation. *See* Pet. 7-10. The plan provision in question, Section 5.12, does not bear any relationship to 29 U.S.C. § 1056(d)(4), and does not have the effect of alienating any participant's pension benefit. Rather, Section 5.12 applies to prevent a participant from receiving *more* than he or she is entitled to receive under the terms of the plan, not less.

The Petitioners incorrectly state that they were seeking a determination that the offsetting of Stanley Gaudet's pension violates the anti-alienation rules of ERISA. *See* Pet. 8. The Petitioners' suit sought to require the NPF to pay benefits allegedly owed under the plan and sought damages for, among other things, past due benefits and future benefits. *See* Pet. App. 8. The NPF lodged a counterclaim seeking, *inter alia*, a declaration that the NPF could recover the overpayments of benefits received by Stanley Gaudet by offsetting pension benefits that otherwise would be payable.[6] *See* Pet. App. 8-9.

The Petitioners' Motion for Partial Summary Judgment sought a declaration that Audrey Gaudet is entitled to benefits

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6. The NPF's counterclaim was subsequently dismissed without prejudice.

from, among others, the NPF as an alternate payee under an alleged QDRO. *See* Pet. App. 9. Petitioners did not seek a declaration that any of the plan's provisions violated the anti-alienation provisions of ERISA.

In response to the Petitioners' Motion for Partial Summary Judgment, the NPF asserted that even if Audrey Gaudet were assigned one-half of Stanley Gaudet's interest under a valid QDRO, Stanley Gaudet had no benefits to assign, because he already received more than he was entitled to receive under the terms of the plan document. *See* Pet. App. 10. Thus, the plan administrator was not engaging in statutory interpretation when it denied any further benefits to, or on behalf of, Stanley Gaudet, but rather was exercising its discretionary plan interpretation function.[7] Accordingly, the court of appeals properly utilized the abuse of discretion standard of review. *See Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 111(1989) ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). In sum, the plan administrator's determination was legally correct and substantially supported by the evidence, and, as the court of appeals noted, the Gaudets failed to demonstrated that the plan administrator abused its discretion. *See* Pet. App. 3.

7. The cases cited by Petitioners, *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) and *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), are inapposite. Both of those cases involved the application of the *de novo* standard of review to questions of law that were being considered by the plan administrator, rather than questions of plan interpretation. In *Smith v. Sydnor*, the court addressed the question of deference where the claims involved alleged violations of specific ERISA provisions, rather than plan interpretation or factual determinations. 184 F.3d at 365. Likewise, in *Penn v. Howe-Baker Engineers, Inc.*, the *de novo* standard of review was applied to the determination of an individual's status as an employee or independent contractor. 898 F.2d at 1101.

III. The NPF's Position Is Also Supported By The Applicable Regulations

Because the premature distributions that Stanley Gaudet made to himself constituted criminal acts of embezzlement and violations of ERISA, the Petitioners erroneously assume that the NPF must rely on the exception in 29 U.S.C. § 1056(d)(4) in order to recoup those distributions.[8] However, the upshot of these unauthorized distributions is that Stanley Gaudet received benefits to which he was not entitled under the terms of the plan, meaning that he received an overpayment of benefits, both in terms of the dollar amounts distributed and the time value of those monies. The Petitioners overlook that an arrangement to recover an overpayment of benefits, such as withholding future payment that otherwise would be payable, is not treated as an alienation or assignment under the applicable regulation promulgated by the Secretary of Treasury.[9] Thus, it is not necessary to rely upon the exception to the anti-alienation rule in 29 U.S.C. § 1056(d)(4), in order to recoup the overpayments Stanley Gaudet made to himself.

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8. The point that the Petitioners fail to grasp is that 29 U.S.C. § 1056(d)(4) is not invoked if the plan addresses the unauthorized distribution in a manner that does not result in an assignment or alienation in the first place.

9. That regulation, 26 C.F.R. § 1.401(a)-13, was promulgated by the Secretary of Treasury, pursuant to Reorganization Plan No. 4 of 1978 ("Reorganization Plan No. 4"), reprinted in 1978 U.S.C.C.A.N. 9814, 9815. Reorganization Plan No. 4 transferred the authority to promulgate regulations implementing 29 U.S.C. § 1056(d) from the Secretary of Labor to the Secretary of Treasury. In *Guidry v. Sheet Metal Workers' National Pension Fund*, 493 U.S. 365, 371-72 (1990), this Court recognized that 26 C.F.R. § 1.401(a)-13 is the administrative regulation that implements 29 U.S.C. § 1056(d). *See Robbins v. De Buono*, 218 F.3d 197, 203-04 n.3 (2d Cir. 2000).

Under 26 C.F.R. § 1.401(a)-13(c)(2)(iii), the terms "assignment" and "alienation" do not include "any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant." Based on the facts and circumstances contained in the record, the withholding of the pension benefits that otherwise would have been payable to Stanley Gaudet clearly constitutes a proper arrangement for the recovery of the overpayments he received by making unauthorized distributions of plan assets to himself while acting as a trustee of the NPF's predecessor plan. Accordingly, there is an additional basis to support the conclusions of the district court and court of appeals below.

CONCLUSION

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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